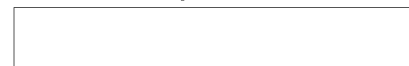




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Soviet Frustrations in the Law of the Sea Conference



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An Intelligence Memorandum

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Soviet Frustrations in the Law of the Sea Conference

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Summary

The US decision last spring to review thoroughly its law of the sea policy put in question the status of the Draft Convention prepared by the Third United Nations Conference on the Law of the Sea (UNCLOS III).

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The action also presented the Soviet Union with a dilemma. On one hand, the USSR generally favors the Draft Convention on the Law of the Sea as it now stands and would prefer to wrap up its gains on navigation issues, end the negotiations, and open the convention for signature. On the other hand, the Soviets would like to curry favor with the Third World by challenging any US attack on the seabed mining provisions of the Draft Convention. Moscow sees little merit in the creation of the proposed International Seabed Authority, but the developing countries favor the present texts on seabed mining, believing that they represent a step toward creation of a "new international economic order."

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The dilemma is somewhat intensified by Moscow's perception that it has not looked good to date in UNCLOS III in its self-appointed role as protector of the interests of the developing countries. Notably, the Soviets were unable in March to prevent the Conference from giving the US delegation an opportunity to air its grievances.

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Essentially there are three choices for the USSR when the Conference reopens in Geneva next month:

- If it joins with the United States—and possibly other Western countries—in expressing concern over the restrictive features of the proposed seabed mining regime, it would enhance the prospects for the developed countries to obtain a text more suited to their interests. In this scenario, Moscow might be able to barter—or at least would try to barter—its support of the United States for its own privileges in seabed mining. Such an alliance, though, would damage Moscow's image in the Third World.
- If, however, Moscow defends the present seabed texts and tries to gain political capital with the developing countries, it faces the risk of contributing to the polarization and destruction of the Conference because the

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treaty in its present or closely similar form is unlikely to be ratified by the United States. Moscow might thus gain some measure of political standing with the Third World but would risk losing a treaty protecting its freedom of navigation.

- All in all, Soviet impotence at the March-April session will weigh heavily in Moscow's thinking, and the USSR probably will have to adopt an accommodating posture in Geneva. The Soviets could become the broker between the developing countries and the United States. This unusual position might even appeal to Soviet self-esteem and could moderate hotter heads in the Third World. In exchange for its brokerage services, however, the USSR would expect the US delegation to keep proposals for change to the bare minimum necessary to obtain ratification.

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**Soviet Frustrations in the
Law of the Sea Conference**

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The USSR's desire to play an influential role in the Third United Nations Conference on the Law of the Sea (UNCLOS III) was largely frustrated at the 10th Session held in New York last March and April. The US decision to review thoroughly its law of the sea policy brought the session to a standstill, and the USSR had little choice but to accommodate the US review.

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Moscow has been hampered in preparing its strategy for the remainder of the 10th Session because of the uncertainty engendered by the US decision, which has, for other delegations as well as the USSR, essentially two dimensions. First, there is uncertainty over the extent of the US policy review and the results it may produce in the way of far-reaching changes in US goals. Second, it is not at all clear whether the US review will be completed by the time the 10th Session resumes in Geneva on 3 August. The delay may also raise doubts in foreign capitals about the commitment of the United States to the treaty-making process.

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The USSR must also weigh its desire for a high profile in an international forum against its own LOS interests. The Soviet Union strongly favors the navigation provisions of the present *Draft Convention on the Law of the Sea* (Draft Convention) because those provisions facilitate warship transit through straits and other narrows. Thus, Moscow has indicated that it is ready to wrap up the negotiations and open the convention for signature. On the other hand, the US review of its position has given Moscow an opportunity to capitalize on its self-appointed role as defender of the Third World. Many of the developing countries have strong feelings about the seabed mining articles in the Draft Convention, believing that they represent a step toward creation of a "new international economic order." These seabed mining articles are at the heart of the US objections to the present text and the main reason for the current review to determine whether US interests are better served by a comprehensive multilateral treaty or by continuation of the present legal regime of customary law with its "open seas" features and liberal use of bilateral agreements with other major maritime nations and states bordering major straits.

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Soviet Objectives

Throughout UNCLOS III, Moscow has attempted to protect its LOS interests and at the same time to appear sympathetic to the needs of the Third World. As a result, UNCLOS III has presented a difficult negotiating environment for the USSR. As a major maritime power, the Soviet Union has played an active role in support of conservative proposals and has tried to

contain initiatives for change that it views as detrimental to its security interests. To that end, Moscow joined the United States, the United Kingdom, France, and Japan in the caucus called the Group of 5. The USSR also pressured its East European allies to support traditional concepts of narrow territorial seas and freedom of navigation in straits. This convergence of Soviet interests with those of the United States and other major industrial/maritime nations, however, frustrates Soviet desires to proselytize developing countries in this international arena. Moscow's positions have even prompted China, particularly in the earlier sessions, to charge collusion by the superpowers to increase their power and wealth at the expense of the developing nations. [REDACTED]

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Navigation

UNCLOS III coincides with the emergence of the Soviet Union as a major maritime power. Two decades ago the Soviet fleet was primarily a coastal defense force that rarely ventured far from its home ports. Today it constitutes a full-fledged high seas navy. The Soviet Navy is one of the means by which the USSR projects its political image—through show-the-flag port calls and a more-or-less permanent presence in various Third World harbors. The desire of the USSR to deploy its new high seas Navy effectively and to employ its growing merchant marine and fishing fleets is evidenced in Soviet Law of the Sea positions. [REDACTED]

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The Soviet Union has emerged in UNCLOS III as one of the strongest proponents of retaining the traditional high seas rights of navigation. Indeed, navigation is the key LOS issue for Moscow. Its strategic interests require that Soviet naval vessels enjoy unimpeded rights of transit from their home ports to the open waters of the Atlantic and Pacific Oceans as well as unimpeded rights of passage between those oceans. The Northern Sea Route—the only interocean route totally within Soviet waters—is navigable only in summer. Reaching the high seas from Soviet ports necessitates passage through such choke points as the Barents and Norwegian Seas and the Danish, Korea, La Perouse, Tsugaru, Gibraltar, Bosphorus, and Dardanelles Straits. Moscow has long been sensitive to any proposal or event that might alter the status of these waters. [REDACTED]

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These navigational interests initially led the USSR to firmly oppose in UNCLOS III the principles of the 200-mile exclusive economic zone (EEZ) or fishing zone. Outnumbered by the developing coastal states, the Soviets have now acquiesced on the 200-mile EEZ but probably want improvements in the Draft Convention text on freedom of navigation and overflight within it. They would prefer a clear statement that the economic zone enjoys high seas status and thus is clearly not under coastal state sovereignty. The Soviets believe that such a clarification is needed as a bulwark against

creeping jurisdiction by coastal states that could interfere with transit rights. However, the regime of transit passage embodied in the Draft Convention appears to satisfy fully Soviet needs for unimpeded transit through and over straits overlapped by 12-mile territorial seas.

The USSR also initially resisted proposals of Indonesia, the Philippines, Fiji, and other island states for archipelagic regimes covering their island dominions. Moscow's navigational concerns, however, have apparently been alleviated by Indonesia's willingness to concede to the establishment of sea lanes and air routes through its archipelago for the "expeditious and unobstructed transit" of foreign ships and aircraft. Still, Soviet acceptance of the archipelagic concept is conditioned upon the entry into force of a comprehensive oceans treaty that safeguards Moscow's navigational needs in straits and economic zones.

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A strong interest in retaining unobstructed navigational mobility in the oceans also spurred Soviet efforts to limit coastal state jurisdiction over broad continental shelves. The Soviets negotiated strenuously to limit the application of the so-called Irish Formula for demarcation of the outer limit of jurisdiction, arguing that formula would allow Australia to claim a 600-mile continental shelf around Heard Island in the Indian Ocean and permit the United Kingdom and New Zealand to claim zones in various areas ranging from 400 to 500 miles in width. Soviet efforts resulted in the crafting of new texts that would cut off coastal state jurisdiction either at 350 miles or at a line 100 miles beyond the 2,500 meter isobath, whichever is farther seaward, provided that the included shelf meets the Irish Formula's tests for sediment thickness and distance from the foot of the continental slope.

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Seabed Mining

Moscow has played a complex game in the LOS negotiations on seabed mining. Like the United States, the USSR wants all states to have guaranteed access to the polymetallic nodules and other seabed resources on an equal legal footing with the Enterprise, the proposed mining arm of the International Seabed Authority (ISA). But Moscow opposes unlimited access by Western corporations and supports a quota/antimonopoly system that would seek to limit the number of minesites available to a state and its nationals. Specifically, the Soviet Union is concerned that:

- Prime minesites will not be available in the future when Soviet industry might need the manganese, nickel, copper, and cobalt found in polymetallic nodules strewn on the seabeds beyond the limits of coastal state jurisdiction.

- The United States and other NATO nations will dominate large areas of the seabed. Soviet naval authorities are concerned that international waters above seabed minesites might become "areas of influence" of the Western democracies.
- The USSR and its allies will not be adequately represented on the 36-member executive Council, the principal managerial organ of the ISA. To this end the USSR will strongly defend the existing text, which guarantees the "socialist" states three permanent seats on the Council.

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The USSR's concern over the technological lead enjoyed by the West in seabed mining is most fully evidenced by its consistent opposition to US proposals for a system of preparatory investment protection (PIP) for seabed miners under the LOS treaty. A PIP measure, akin to a grandfather clause, has been sought to protect corporate investments in seabed mining made prior to the entry into force of the Convention. It would grant early investors a priority, once the Convention enters into force, to mine the sites for which their equipment has been customized. The USSR's opposition appears to stem from a fear that a favorable PIP arrangement would allow early applicants from the industrial nations to corner the prime minesites in the Pacific Ocean, to the disadvantage of the Soviet Union and other late entrants who trail in the development of seabed technology.

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Boundary Disputes

The USSR is also a key player in the controversy over how maritime boundaries between opposite and adjacent states are to be delimited and how boundary disputes are to be settled. Moscow favors the current provisions of the Draft Convention, which tilt toward the concept of equitable principles as the preferred criterion for delimiting economic zone and continental shelf boundaries and which also exclude existing boundary disputes from binding arbitration procedures. Its position is forged by longstanding boundary disputes with Norway and Sweden in the Barents and Baltic Seas, respectively. The USSR wants to remain free to pressure these smaller states unilaterally for boundary concessions, using the argument that special circumstances existing in the area make a strong case for drawing boundaries that deviate from an equidistant line.

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Soviet Reaction to US Policy Review

Most conference delegations were bewildered and frustrated by the announcement of the US policy review. Many participants had believed that the 10th Session in New York would be the last negotiating session of the Conference. Even the skeptics thought that the few remaining matters could be settled at a follow-up session this summer in time for the signature of the convention in Caracas in 1982. While Moscow was annoyed both by the timing of the US announcement and by the lack of advance notice, it is far more concerned about the outcome. Statements of the Soviet delegation

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were marked by efforts to affirm the basic "package deal" of the Draft Convention as it stands and to stress the difficulty of making any fundamental changes in that package. Nevertheless, the Soviets stopped short of supporting the Draft Convention as it stands on a "take it or leave it" basis.

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The US action presented Moscow with an irresistible opportunity to curry favor with the developing countries by criticizing the United States, and it did so throughout the session. Soviet comments, however, were relatively restrained. The USSR's public posture was one of continuing support for adoption of the Convention by consensus, but Deputy Foreign Minister Kozyrev privately threatened the United States with pushing through a vote on the Convention if the US delegation was not prepared to participate in the conclusion of the treaty.

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Nowhere was the Soviet effort to defend the Draft Convention more apparent in New York than in meetings of Committee II, which deals with navigation issues and questions of coastal state jurisdiction over living and nonliving resources. Several territorialist-minded developing coastal states, in interventions stage-managed by Peru, pressed for changes in the Draft Convention that would strengthen coastal state rights at the expense of the rights of the international community. The interventions were stronger than in previous sessions, but the coastal state attack was met head on with equal ferocity by the Soviets on both procedural and substantive grounds.¹

Moscow's deep concern over the fate of the Draft Convention was clearly reflected in a "nonpaper" presented to Secretary of State Haig by Ambassador Dobrynin on 15 May. The document states that the USSR is profoundly convinced that there exists a pressing need for a rapid conclusion of an LOS treaty. In Moscow's opinion the Draft Convention contains a comprehensive set of provisions of international law that was negotiated as a complex package of balanced compromises by some 150 states. The USSR assumes that after some minor work on the Draft Convention at the forthcoming session in Geneva, it could be adopted and opened for signature. Hope is expressed that this goal will find the support of all the conference participants "without exception."

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¹ In Committee III (marine scientific research and pollution) Chairman Yankov of Bulgaria did well by the Soviets. That committee met only once during the New York session, and the chairman held to his view that negotiations had been completed at the Geneva session in 1980 and that any attempt to reopen substantive negotiations on these subjects would endanger the compromises already achieved. In Committee I (responsible for seabed mining), discussion of the resolution on the Preparatory Commission continued, but no serious negotiations were conducted. The Group of 77, or G-77 as the caucus of the LDCs is called, blocked any work on measures for preparatory investment protection for early seabed miners as long as the United States was unable to engage in the negotiations.

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Ambassador Dobrynin's note made no effort to hide Moscow's pique at the confusion and delay caused by the US actions. The paper criticized the United States for its obstructionist position, alleging that the resultant situation provided an opportunity for territorialist-minded developing coastal states to reopen discussions on a number of sensitive issues on which compromise was reached earlier—such as the navigation of warships in the territorial sea, the regime of the exclusive economic zone, fishery problems, and the regime of the high seas. Moscow's message was clear: it believes the Draft Convention on the Law of the Sea is a fragile package that must be adopted soon or it will unravel as various pressure groups seek to tilt the document's language in their favor. [REDACTED]

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The Soviets continued to press the United States at recent bilateral LOS consultations in Moscow. They urged the US delegation to divulge the exact nature of the changes the United States would seek in the Draft Convention. Disappointed upon being informed that the US review had not reached the stage where concrete proposals had emerged, the Soviets noted that both the United States and the USSR had undertaken an obligation to the developing countries by our basic acceptance, albeit reluctantly, of the common heritage theme and the treaty text in August 1980. The USSR, they stated, wants to cooperate with the United States but wonders how it could go back on its commitments. They believe that, all things considered, it is dangerous to introduce dramatic or fundamental changes to the seabed mining text of the Draft Convention, emphasizing that such proposals might undercut achievements in other parts of the Convention and open the door to unilateral action in the oceans. [REDACTED]

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On balance, the USSR probably feels that it lost more than it gained at the LOS session in New York. [REDACTED]

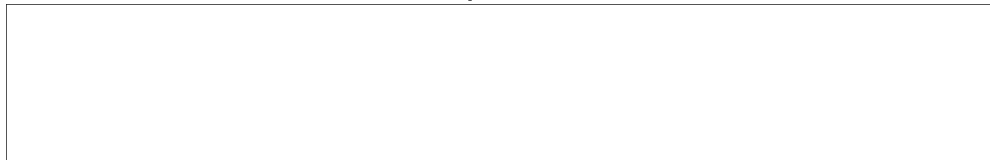
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The Soviets also realize that the US-induced stalemate in New York made it clear to all participants that the United States is the technological leader in the nascent seabed mining industry and enjoys a paramount role in the negotiations on this critical issue. The USSR, therefore, is not able to count UNCLOS III as an international forum where it enjoys parity with the United States. [REDACTED]


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Outlook for Geneva

If the United States signals that its troubles with the Draft Convention do not strike at the root of the provisions on seabed mining, the Group of 77 probably would be willing to negotiate various changes in the text and postpone adoption of the Convention until 1982 or later. However, if the United States reveals that it has profound troubles with the text on seabed mining, one of the first reactions of the Group of 77 would be to try to isolate the United States. Strong pressures would be applied against the West Europeans, Japanese, and Soviets in an effort to persuade them to support the existing Draft Convention. 

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Part of the answer to adjusting the Draft Convention is to be found in the mechanisms of UNCLOS III, where procedures have emphasized informal negotiations and consensus decisionmaking. The "gentlemen's agreement" reached in 1974 suspends the normal voting procedure of United Nations-sponsored conferences that calls for decisions by a two-thirds vote. The LOS delegates agreed instead to negotiate the issues until consensus is reached. Consensus in UNCLOS III, however, is not interpreted as unanimity; rather, it is a judgment call by each of the chairmen of the Conference's three committees. Each chairman may declare that consensus has been reached when it becomes obvious that, following protracted negotiations among major interest groups, a point is reached where all further efforts to draft or amend a particular segment of the text are fruitless. He states that a standoff has been reached and that the texts in question have struck a middle ground between the divergent views of contending parties. The flexibility of the term is also evident in other situations. For example, consensus can be declared on major issues even if a few smaller countries had objected to the texts discussed in committee as long as no state challenges the chairman's interpretation. On less sensitive issues consensus might be declared over the objections of an even greater number of less influential states. However, the vigorous protests of the United States, several of the major Western nations, the USSR and its allies, or the Group of 77 can usually prevent the adoption of new text or the amendment of existing articles. 

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While it is clear that a determined United States acting alone has strong negative influence under the consensus procedure, it is uncertain whether, even with the support of Western allies, it has the power to force changes in the Draft Convention over the objections of a unified Group of 77. The task

would become feasible, however, if the Soviet Union and Eastern Europe were to lend their support. Such support obviously would require some measure of compensation for Moscow. It is logical to assume that, at a minimum, the Soviets would ask that their three seats on the Council of the International Seabed Authority continue to be guaranteed and that the anti-monopoly/quota provisions remain intact. In addition, it would not be surprising to see Moscow bargain for changes in the system of access that would assure it and its allies one or two minesites during the first years of commercial activity on the seabeds. Other demands could also follow if the Soviets succeeded in occupying a pivotal position in UNCLOS III between the developing countries and the Western industrialized nations. [REDACTED]

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The Soviet Union could try to exploit the situation to gain as much political capital as possible with the Third World, pointing out that the United States intends to grab for itself the resources of the seabed that the United Nations once declared to be the "common heritage of mankind." If Moscow were to choose the path of cooperating with the developing countries, however, it would face the risk of destroying the Conference and, with it, the navigation provisions of the Draft Convention which the Soviets seem so eager to embrace. For it is clear that the Treaty in its present form, or closely similar form, would not be ratified by the United States. [REDACTED]

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The USSR may find it difficult to escape the role of broker, being forced by events to serve as an intermediary or tie breaker between the United States and the Group of 77 if it wants to preserve the navigational safeguards provided by the Draft Convention. It could turn out to be a close call for Moscow, debating whether to pick a side in the coming North-South confrontation or to adopt a statesmanlike posture. [REDACTED]

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We believe the Soviets will opt for a posture of accommodation at Geneva and at any subsequent sessions of UNCLOS III. They realize that US participation in an LOS treaty is indispensable if its rules are to enter into force as norms of international law. They do not, on the other hand, wish to offend the Third World by being too closely identified with the West's criticism of the present seabed mining package. They are also keenly aware of their impotence at the March-April session. The Soviets, therefore, will do just enough for the United States to make a claim for the retention of their perquisites in the seabed mining area. They are likely to operate in the background, preferring to make their views known through the offices of the President of the Conference rather than to engage directly in any North-South dogfight. All the while, however, the Soviet delegation will be applying pressure—perhaps publicly as well as privately—on the US delegation to keep its proposals for change to the bare minimum necessary to obtain ratification by the US Senate. [REDACTED]

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